

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
ASSIGNED ON BRIEFS JANUARY 9, 2008

**MARK L. PECK v. TENNESSEE DEPARTMENT OF CORRECTION**

**Direct Appeal from the Chancery Court for Wayne County**  
**No. 11921     Jim T. Hamilton, Chancellor**

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**No. M2007-00554-COA-R3-CV - Filed March 28, 2008**

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This appeal involves the chancery court's dismissal of a prisoner's petition for writ of certiorari. The chancery court found that it lacked subject matter jurisdiction because the prisoner did not file his petition within sixty days from the entry of the order. We affirm the chancery court's dismissal.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed**

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the court, in which DAVID R. FARMER, J., joined and W. FRANK CRAWFORD, J., did not participate.

Mark L. Peck, Clifton, TN, *pro se*

Robert E. Cooper, Jr., Attorney General and Reporter, Michael E. Moore, Solicitor General, Joshua D. Baker, Assistant Attorney General, Nashville, TN, for Appellee

**OPINION**

**I. FACTS & PROCEDURAL HISTORY**

Mark L. Peck ("Appellant") is an inmate in the custody of the Tennessee Department of Correction ("TDOC"), currently housed at the South Central Correctional Facility located in Clifton, Tennessee. On March 27, 2006, Mr. Peck was charged with a disciplinary infraction of conspiracy to violate state law by the introduction of drugs into a penal facility. The South Central Correctional Facility's disciplinary board held a hearing on April 10, 2006, and found Mr. Peck guilty of the aforementioned class "A" infraction. Mr. Peck filed an administrative appeal on April 14, 2006, challenging the disciplinary board's ruling. On April 28, 2006, the South Central Correctional Facility's warden affirmed Mr. Peck's conviction. Thereafter, Mr. Peck sent Commissioner George Little a letter questioning a specific provision in the warden's disciplinary appeal report. Apparently, Commissioner Little treated the letter as a disciplinary appeal, and in a memorandum dated May 31,

2006, informed Mr. Peck that “[y]our appeal was denied on 5/11/06. That response is final and not subject to appeal.”

On October 19, 2006, Mr. Peck filed a petition for writ of certiorari in chancery court in Wayne County, Tennessee. The petition bears a notary’s seal and date of August 15, 2006. Mr. Peck challenged the warden’s April 28, 2006 report affirming the disciplinary board’s decision. Mr. Peck argued that the disciplinary board did not allow him to prepare an adequate defense, including its refusal to accept a witness request form from Mr. Peck’s inmate advisor. Mr. Peck did not raise Commissioner Little’s denial of his appeal dated May 11, 2006, nor is this information mentioned in the petition. Thereafter, Mr. Peck attempted to “amend” his petition on two separate occasions. On December 13, 2006, Mr. Peck filed with the court a handwritten document styled “TO BE AMENDED TO PETITIONER ‘WRIT OF CERTIORARI,” which mentions the letter Mr. Peck sent to Commissioner Little. Nowhere in the record is there any indication that the chancery court granted Mr. Peck leave to amend his petition.

Thereafter on January 16, 2007, Mr. Peck filed a motion for a change of venue and a “motion to stay judgment.”<sup>1</sup> On January 19, 2007, TDOC filed a motion to dismiss for lack of subject matter jurisdiction because Mr. Peck did not file his petition within the statutory time frame. The motion was scheduled for a hearing on February 5, 2007. Mr. Peck did not file a response to TDOC’s motion to dismiss prior to the hearing. We do not have a transcript of this February 5 hearing in the record before us.

After the February 5 hearing, on February 7, 2007, Mr. Peck filed a motion for an extension of time, requesting that the court set the February 5 hearing for February 15. Mr. Peck also filed a response to TDOC’s motion to dismiss on February 16, 2007, arguing that “had the South Central Correctional Facility [ ] not interfered with the petitioner[’s] access to the Court, this accusation [that his petition was untimely] could not and would not have been made.”

On February 20, 2007, the chancery court dismissed Mr. Peck’s petition for lack of subject matter jurisdiction. The order read, in relevant part:

The Petitioner’s disciplinary appeal was denied on April 28, 2006. Thereafter, the Petitioner had sixty days to file a certiorari petition challenging that decision. The petition submitted to this Court was not signed by the Petitioner until August 15, 2006, one hundred and nine (109) days after his appeal was denied, and was not filed until October 19, 2006, one hundred and sixty-four (164) days after his appeal was denied. The petition was therefore untimely. . . .

Mr. Peck timely filed his notice of appeal.

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<sup>1</sup> Mr. Peck sought in his “motion to stay judgment” that the court “not [ ] make any ruling until the Motion for a Change of Venue has been ruled upon.”

## II. ISSUES PRESENTED

Mr. Peck contends that the chancery court erred in the calculation of the sixty days in which he had to file his petition. He also contends that the chancery court arbitrarily and capriciously dismissed his petition. Finally, Mr. Peck argues that his due process rights were violated because the chancery court did not rule on some of his filed motions prior to its dismissal. As we will discuss in turn, none of these arguments has any merit.

## III. STANDARD OF REVIEW

Subject matter jurisdiction involves a court's authority to adjudicate a particular controversy. *Jackson v. Tennessee Dep't. of Corr.*, 240 S.W.3d 241, 243 (Tenn. Ct. App. 2006) (citing *Meighan v. U.S. Sprint Communications Co.*, 924 S.W.2d 632, 639 (Tenn. 1996); *Standard Sur. & Cas. Co. v. Sloan*, 180 Tenn. 220, 230, 173 S.W.2d 436, 440 (1943)). Whether a court has properly dismissed a case due to lack of subject matter jurisdiction is purely a question of law. *Id.* (citing *Nelson v. Wal-Mart Stores, Inc.*, 8 S.W.3d 625, 628 (Tenn. 1999)). We review questions of law *de novo*, with no presumption of correctness afforded to the lower court's decision. *Id.*

## IV. DISCUSSION

### A. Timeliness of the Petition

On appeal, Mr. Peck contends that the chancery court erred in the "calculation" of the time period in which he had to file the petition. We disagree.

Our legislature has the authority to place reasonable time limitations on the issuance of writs. *Thandiwe v. Traugher*, 909 S.W.2d 802, 803 (Tenn. Ct. App. 1994) (citing *Fairhaven Corp. v. Tennessee Health Facilities Comm'n.*, 566 S.W.2d 885, 886 (Tenn. Ct. App. 1976)). Tenn. Code Ann. § 27-9-102 provides that "[s]uch party shall, within sixty (60) days from the entry of the order or judgment, file a petition of certiorari in the chancery court . . . ." Thus, it is clear that the petition of certiorari must be filed within sixty days of the challenged action. *Rhoden v. Tennessee Dep't. of Corr.*, 984 S.W.2d 955, 956 (Tenn. Ct. App. 1998) (citations omitted). The sixty day time limit applies both to statutory and common law writs of certiorari. *Gore v. Tennessee Dep't. of Corr.*, 132 S.W.3d 369, 379 (Tenn. Ct. App. 2003) (citing *Fairhaven Corp. v. Tennessee Health Facilities Comm'n.*, 566 S.W.2d 885, 886 (Tenn. Ct. App. 1976)). "If the petition for certiorari shows on its face that it was filed beyond the sixty-day statute of limitations provided by Tennessee Code Annotated section 27-9-102 this defect is fatal to subject matter jurisdiction . . . ." *Id.* at 374. In other words, the "[f]ailure to file within the statutory time limit deprives the court of subject matter jurisdiction." *Id.* at 379 (citing *Wheeler v. City of Memphis*, 685 S.W.2d 4, 5 (Tenn. Ct. App. 1984)).

Essentially, Mr. Peck argues that the Commissioner denied his appeal on May 31, 2006, the date of the letter, and that the sixty day period should begin from this date. He also contends that

he signed the petition on August 15 and gave it to the correctional officer for mailing, but “[a]s to why the Court did not stamp the Writ as filed until October 19, 2006, the appellant cannot say.” As to the issue of the court entering the petition on October 19, Mr. Peck has the burden of establishing his timely filing of the petition pursuant to Rule 5.06 of the Tennessee Rules of Civil Procedure:

If papers required or permitted to be filed pursuant to the rules of civil procedure are prepared by or on behalf of a pro se litigant incarcerated in a correctional facility and are not received by the clerk of the court until after the time fixed for filing, filing shall be timely if the papers were delivered to the appropriate individual at the correctional facility within the time fixed for filing. . . . Should timeliness of filing or service become an issue, *the burden is on the pro se litigant to establish compliance with this provision.*

(emphasis added). Giving Mr. Peck every benefit of the doubt, and assuming that Mr. Peck did in fact present his petition to an appropriate prison official on August 15, and further assuming that we look at Commissioner Little’s denial, which occurred on May 11, 2006, this would still fall beyond sixty days in which Mr. Peck had to file. And clearly if the disciplinary board’s decision date of April 28 is used, the petition is untimely. Thus, the chancery court lacked subject matter jurisdiction and dismissal of the petition was proper. As to Mr. Peck’s argument that the chancery court arbitrarily and capriciously dismissed his petition, this argument has no merit. The trial court lacked the authority to hear this petition.

We also cannot help but point out that Mr. Peck’s petition states that “[t]his is the Petitioner second application [sic] for the writ of certiorari.” Tenn. Code Ann. § 27-8-106 requires that the petition “shall state that it is the first application for the writ.” But in any event, as just discussed, the chancery court did not err in dismissing Mr. Peck’s petition for lack of subject matter jurisdiction.

### ***B. Unanswered motions***

Mr. Peck argues that the chancery court’s failure to address his various motions prior to its order of dismissal was a violation of his due process rights. This argument has no merit.

From the record before us, we see no indication that the chancery court took any action on Mr. Peck’s motions. Mr. Peck does not specify which motions he is addressing in his argument, other than he filed “numerous Motions, motions which were proper, but never acted upon by the trial court . . . .” As to Mr. Peck’s motion for a change in venue, Tenn. Code Ann. § 41-21-803 provides that “an action that accrued while the plaintiff inmate was housed in a facility operated by the department shall be brought in the county in which the facility is located.” Thus, venue was proper in Wayne County, where the prison is located and where Mr. Peck filed his petition. And looking at Mr. Peck’s motion for an extension of time and motion for a stay, such motions would not have had any bearing on the outcome, as the court lacked subject matter jurisdiction. We also note that

the motion for an extension of time was not filed until after the hearing, and that the motion for a stay related to the motion for change of venue, which we have already noted lacked any merit. In Mr. Peck's response to TDOC's motion to dismiss, Mr. Peck contended that he filed with the chancery court a handwritten motion for an extension of time on June 27, 2006. We agree with TDOC that such motion is not in the record. While this Court does not approve of trial courts' failure to respond to motions filed by *pro se* litigants, see ***Bell v. Todd***, 206 S.W.3d 86, 91 (Tenn. Ct. App. 2005), such failure in this case was not inappropriate, as the trial court lacked subject matter jurisdiction.

## V. CONCLUSION

We affirm the chancery court's dismissal of Mr. Peck's petition. Costs of this appeal are to be taxed to Appellant, Mark L. Peck, for which execution may issue if necessary.

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ALAN E. HIGHERS, P.J., W.S.